Luther Manor Nursing Home *and* United Food and Commercial Workers Union, Local No. 304A, United Food and Commercial Workers International Union, AFL-CIO, CLC. Case 18-CA-7117

30 May 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND DENNIS

On 28 September 1982 Administrative Law Judge William F. Jacobs issued the attached decision. The General Counsel and the Charging Party filed exceptions and supporting briefs, and the Respondent filed briefs in reply to the exceptions and in support of the judge's decision.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions, but not to adopt his recommended Order.[2]

AMENDED REMEDY

Having found that the Respondent has engaged in certain unfair labor practices in violation of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom and that it take certain affirmative action to effectuate the policies of the Act.

The judge found, and we agree, that the Respondent engaged in unlawful conduct by withdrawing the wage proposal previously offered for all unit employees, and later restricting the offer to full-time employees only, but nonetheless failed to recommend that a general bargaining order be issued. Contrary to the judge, and for the following reasons, we hold that the Respondent's conduct, described above, warrants the imposition of such a bargaining order.

As found by the judge, subsequent to the last face-to-face negotiation session the Union, through its negotiator Dowd, contending that the parties had reached agreement, submitted a document which it believed reflected such agreement, and which included a provision as to wages. Thereafter, an exchange of correspondence took place, culminating in a letter dated 9 February 1981 from the Respondent, through its negotiator Tate, which took issue, inter alia, with the wage provision set out in the Union's document. The Respondent claimed that wage increases were to apply to full-time, and not part-time, employees, and that part-time employee wages had yet to be discussed. The judge found that the wage package was to apply to all employees, and that it was not until February, when relations between the parties had degenerated and thereby impeded the negotiating process, that Tate—angered by what he considered to be Dowd's irksome requirement that Tate submit his position in writing before scheduling a further meeting—effectively withdrew the wage offer already agreed to as it pertained to part-time employees. The judge concluded, and we agree, that such withdrawal of the wage proposal was reflective of bad faith and violated Section 8(a)(5) of the Act. Under these circumstances we believe that a general bargaining order is warranted.[3] Although the Respondent consistently offered to meet with the Union, its 9 February version of the wage proposal was clearly less favorable than what had already been agreed to. Nor do we find, with respect to this issue, that the Union's conduct in asking for the Respondent's written proposal, prior to any further meeting, to be so egregious as to warrant a departure from our usual practice of granting a general bargaining order under circumstances such as these, and we shall so order.

[1] The General Counsel and the Charging Party have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In the absence of exceptions Chairman Dotson adopts the judge's findings that the Respondent violated the Act.

The judge, at fn. 5 and the accompanying text of his decision, relied, in part, on the absence of agreement on certain "contract language" as a basis for concluding that the parties never reached final agreement. To the extent that this discussion implies that a writing is a prerequisite to a final agreement we do not adopt it. As we indicated in *Georgia Kraft Co.*, 258 NLRB 908 (1981), 696 F.2d 931 (11th Cir. 1983), the duty to bargain includes the obligation to assist in reducing an oral agreement to writing. That obligation, however, arises only after a meeting of the minds on all substantive issues has occurred. Here, the parties' disagreement transcended a dispute as to contract language, and involved a disagreement over the substance of certain contract terms. Thus, the requisite meeting of the minds as to all substantive matters did not occur. It is for this reason that we adopt the judge's conclusion that the parties did not reach final agreement on 16 December 1980.

[2] We shall modify the recommended Order of the judge in accordance with our amended remedy to include a narrow cease-and-desist order, to reflect our decision in *Sterling Sugars*, 261 NLRB 472 (1982), and to conform to the violations found.

[3] See, for example, *San Antonio Machine Corp.*, 147 NLRB 1112 (1964), enfd. 363 F.2d 633 (5th Cir. 1966), where during the course of bargaining respondent submitted proposals less advantageous than, inter alia, the tentative agreements already reached by the parties.

In agreeing with his colleagues that a general bargaining order is warranted here, Chairman Dotson relies specifically on the Respondent's unilateral implementation of a series of changes in terms and conditions of employment without notice to the Union. See *Schraffts Candy Co.*, 244 NLRB 581 (1979); *Sturdevant Sheet Metal & Roofing Co.*, 238 NLRB 186 (1978), enfd. 636 F.2d 271 (10th Cir. 1980).

ORDER

The National Labor Relations Board orders that the Respondent, Luther Manor Nursing Home, Sioux Falls, South Dakota, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain collectively, on request, with the Union, as the exclusive bargaining representative of all employees in the bargaining unit described below, with respect to the rates of pay, wages, hours of employment, and other terms and conditions of employment. The appropriate collective-bargaining unit is:

> All full-time and regular part-time licensed practical nurses and service and maintenance employees employed by the Respondent at its Sioux Falls, South Dakota, facility; excluding administrator, assistant administrator, registered nurses, business office clericals, guards and supervisors as defined in the Act.

(b) Withdrawing wage proposals previously agreed upon.

(c) Unilaterally withholding wage increases, during the course of collective bargaining, from employees not covered by Government wage regulations, in disregard of preexisting policy.

(d) Unilaterally granting wage increases; provided, however, that nothing in this Order shall be construed as authorizing or requiring the Respondent to withdraw or eliminate any wage increase presently enjoyed by the Respondent's employees.

(e) Unilaterally changing its sick leave and absenteeism policy.

(f) Unilaterally reclassifying employees into supervisory positions.

(g) Withholding wage increases from employees not covered by Government wage regulations, during the course of collective bargaining, in order to discourage employee support for the Union.

(h) Granting unilateral wage increases and falsely blaming the Union for the delay in granting such increases in order to discourage employee support for the Union; provided, however, that nothing in this Order shall be construed as authorizing or requiring the Respondent to withdraw or eliminate any wage increase presently enjoyed by the Respondent's employees.

(i) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain collectively, with the Union as the exclusive bargaining representative of all the employees in the bargaining unit described above, with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Maintain and enforce sick leave and absenteeism policy in accordance with preexisting policy.

(c) If requested to do so by the Union, revoke and cease utilizing the employee classification of licensed practical nurse supervisor, and return to the unit all licensed practical nurses who were promoted to supervisor.

(d) Make whole its employees for any loss of earnings incurred by them as a result of their being discriminatorily denied a wage increase, with interest, to be computed in the manner prescribed in *Florida Steel Corp.*, 231 NLRB 651 (1977). (See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).)

(e) Expunge from its files any references to unexcused absences, if such absences were caused by the illnesses or medical needs of an employee's child, and notify any employees so affected, in writing, that this has been done, and that evidence of these unlawful unexcused absences will not be used as a basis for future personnel actions against them.

(f) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order, and the amount of backpay due.

(g) Post at its facility in Sioux Falls, South Dakota, copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 18, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Company to ensure that the notices are not altered, defaced, or covered by any other material.

(h) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the allegations of the complaint not specifically found herein be, and they are, dismissed.

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[4] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT fail and refuse to bargain collectively, on request, with United Food and Commercial Workers Union, Local No. 304A, United Food and Commercial Workers International Union, AFL-CIO, CLC, as the exclusive bargaining representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment. The bargaining unit is:

> All full-time and regular part-time licensed practical nurses and service and maintenance employees employed by us at our Sioux Falls, South Dakota, facility; excluding administrator, assistant administrator, registered nurses, business office clericals, guards and supervisors as defined in the Act.

WE WILL NOT withdraw wage proposals previously agreed upon.

WE WILL NOT unilaterally withhold wage increases, during the course of collective bargaining, from employees not covered by Government wage regulations, in disregard of preexisting policy.

WE WILL NOT unilaterally grant wage increases; provided, however, that nothing in the Order shall be construed as authorizing or requiring us to withdraw or eliminate any wage increase presently enjoyed by our employees.

WE WILL NOT unilaterally change our sick leave and absenteeism policy.

WE WILL NOT unilaterally reclassify employees into supervisory positions.

WE WILL NOT withhold wage increases from employees not covered by Government wage regulations, during the course of collective bargaining, in order to discourage employee support for the Union.

WE WILL NOT grant unilateral wage increases and falsely blame the Union for such delay in order to discourage employee support for the Union; provided, however, that nothing in the Order shall be construed as authorizing or requiring the Respondent to withdraw or eliminate any wage increase presently enjoyed by our employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights protected by the National Labor Relations Act.

WE WILL, on request, bargain with the abovenamed Union, as the exclusive bargaining representative of all employees in the bargaining unit described above, with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

WE WILL maintain and enforce our sick leave and absenteeism policy in accordance with preexisting policy.

WE WILL, if requested to do so by the Union, revoke and cease utilizing the employee classification of licensed practical nurse supervisor, and return to the unit all licensed practical nurses who were promoted to supervisor.

WE WILL make our employees whole for any loss of earnings incurred by them as a result of their being discriminatorily denied a wage increase, with interest.

WE WILL expunge from our files any references to unexcused absences, if such absences were caused by the illnesses or medical needs of an employee's child, and WE WILL notify any employee so affected, in writing, that this has been done, and that evidence of these unlawful unexcused absences will not be used as a basis for future personnel actions against them.

LUTHER MANOR NURSING HOME

DECISION

STATEMENT OF THE CASE

WILLIAM F. JACOBS, Administrative Law Judge. This case was tried before me on June 10 and 11 and July 21, 1982, in Sioux Falls, South Dakota. The charge was filed on March 11, 1981, by United Food and Commercial Workers Union, Local No. 304A, United Food and Commercial Workers International Union, AFL-CIO, CLC, the Union, against Luther Manor Nursing Home, the Respondent. Complaint issued on October 29, 1981,[1] alleging that the Respondent violated Section 8(a)(1), (3), and (5) of the Act by granting wage increases to newly hired employees while denying similar wage increases to older employees for discriminatory reasons; withdrawing from agreements previously reached with the Union in contract negotiations in areas of wages, health insurance, hours of work and overtime, holidays, vacations, sick leave, funeral leave, time off for union activities, coverage, and supervisors; unilaterally withholding annual wage increases of employees hired before January 1, 1981, in disregard of its preexisting policy; unilaterally increasing the starting wage rates of new employees; uni-

[1] The allegations of the complaint appear as amended at the hearing.

laterally withholding wage increase adjustments from employees not covered by Government wage regulations in disregard of its preexisting policy; unilaterally increasing the cost of health insurance premiums; unilaterally implementing new policies regarding sick leave and absenteeism of employees; unilaterally increasing wages of employees hired since January 1, 1981; unilaterally reclassifying its licensed practical nurses ostensibly as supervisors thereby attempting to exclude them from the collective-bargaining unit; and failing and refusing to execute a fully agreed upon collective-bargaining agreement. In its answer[2] to the complaint the Respondent denies the commission of any unfair labor practices.

All parties were represented at the hearing and were afforded full opportunity to be heard and to present evidence and argument. Briefs were duly filed. On the entire record, my observation of the demeanor of the witnesses and after giving due consideration to the briefs, I make the following

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

The Respondent, a South Dakota corporation with an office and place of business in Sioux Falls, South Dakota, has been engaged as a health care institution in the operation of a nursing home, providing in-patient medical and professional care services for its residents. During the 12-month period ending June 30, 1981, the Respondent, in the course and conduct of its operations, derived gross revenues in excess of $100,000 and purchased and received at its Sioux Falls facility goods and supplies valued in excess of $5000 directly from suppliers located outside the State of South Dakota. The Respondent is now, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and a health care institution within the meaning of Section 2(14) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The Union is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.[3]

III. THE UNFAIR LABOR PRACTICES

A. *Events Prior to February 1981*

On January 2, 1980,[4] the Union was certified as the exclusive collective-bargaining representative of the following unit employees:

> All full-time and regular part-time licensed practical nurses and service and maintenance employees employed by the Respondent at its Sioux Falls, South Dakota facility; excluding administrator, assistant administrator, registered nurses, business office clericals, guards and supervisors as defined in the Act.

Following certification of the Union, negotiations were undertaken toward a collective-bargaining agreement with the Union presenting its initial set of written proposals through its International representative Michael Corbett to the Respondent's representative John Tate on January 25. On February 12 the parties met again and Tate offered the Respondent's counterproposal. Thereafter Corbett and Tate met in negotiations several times, slowly narrowing the points of disagreement. As of June, however, there remained a large number of problems to be worked out.

In June or July the Retail Clerks Union and the Amalgamated Meat Cutters Union merged to form Local 304A, United Food and Commercial Workers International Union which entity thereafter assumed responsibility for contract negotiations through its attorney J. Peter Dowd. After being brought up to date on the negotiations Dowd met with Tate for the first time on August 18 to continue negotiations. At this meeting the positions of the parties were reviewed and some additional agreement reached to a minor degree on certain provisions. The parties met again on November 13 and corresponded at various times forwarding to each other modified proposals and positions on certain proposed contract provisions.

On December 15 Dowd and Tate met for what would be the last negotiation session. Issues yet to be resolved concerned the effective date of the contract, grievances and arbitration, health and welfare, holidays, leaves of absence, length of contract, payments for lunch and dinner, pensions, posting of schedules, sick leave, stewards, wages, and workweeks. There remained also the job of working out language for other provisions already agreed on. After a full day of bargaining, all issues except those concerning wages, health insurance, and paid lunches and dinners had apparently been resolved. Late in the afternoon Tate made his final offer as to wages, health insurance, and lunches and dinners with the understanding that the Union would take the final offer back to the unit employees and advise Tate later of the outcome of the ratification vote. Unfortunately the wording of the final health insurance offer as dictated by Tate and written by Dowd was ambiguous: "Present EE contribution to remain the same for three years." Dowd and the other union representatives understood the term "contribution" to refer to the premiums being paid in dollars whereas Tate understood that term to refer to the two-thirds cost currently being paid by employees. Thus, by the Union's interpretation, if the costs of health insurance were to increase, the amount paid by employees would remain the same and the Employer would pick up the added costs. Tate's interpretation was that any increase in the costs of health insurance would continue to be borne by the employees and the Employer in the same two-thirds to one-third ratio as in the past. In my opinion there was no meeting of the minds on this issue. Nowhere does the record indicate that Tate specifically stated that the Employer would pick up any increase in premiums. On the contrary, wherever Dowd testified on the subject, employee contributions were always expressed in terms of fractions of the cost, mostly two-

[2] The answer was amended at the hearing.
[3] As per the stipulation entered into at the hearing.
[4] Until otherwise indicated, all dates henceforth are in 1980.

thirds and one-third. If agreement had been reached on a freeze on the amount paid by employees, it should have been expressed in dollars and cents, not in percentages or fractions of the total cost. Indeed, if it were agreed that premium costs to employees were frozen, percentages or fractions of the total cost would no longer be relevant. Inasmuch as the negotiators at the bargaining table continue to express themselves in terms of two-thirds and one-third of the total cost, I find that it was reasonable for Tate to interpret the supposed agreement the way he did. There being no meeting of the minds on this issue and there still remaining contract language to be agreed on in at least 11 articles,[5] I find that final agreement had not been reached on December 15.[6] Since the Board has no authority to order an employer to execute a contract to which it has not assented, I shall not recommend that the Employer in the instant case be ordered to do so. *H. K. Porter Co. v. NLRB*, 397 U.S. 99 (1970). On the contrary, I shall recommend that those paragraphs in the amended complaint which allege a failure on the part of the Employer to execute an agreed-upon collective-bargaining agreement be dismissed.

In addition to the above-described misunderstanding as to the meaning of the health insurance provision, the parties also had differing conceptions as to the procedure to be followed after negotiations were concluded on December 15. Tate was under the impression that Dowd would get back to the unit employees that evening with the Employer's final offer and advise him of their position. He waited 2-1/2 hours at the hotel but received no contact from Dowd. Dowd, on the other hand, felt that it was too late in the day to try to get the unit employees together for a ratification vote so he scheduled a meeting with them for the following evening for that purpose. He, of course, had no intention of calling Tate that night and presumably did not know that Tate, who remained at the hotel overnight, was awaiting his call.

The following day, December 16, Tate checked several times at the desk for messages from Dowd and in addition kept in touch with the nursing home in case there was something that came up of a pressing or critical nature. Since the ratification meeting had not yet taken place there were no messages from Dowd and Tate checked out of the hotel.

On the evening of December 16 or 17[7] the employees voted to accept the Employer's last and final offer, but just the economic package. Thereafter, Dowd tried to telephone Tate to let him know the outcome of the ratification vote but was unsuccessful. On the morning of December 17 he was able to contact Tate's wife who told Dowd that Tate had left. Dowd left the message with her concerning the ratification vote and requested that she have Tate call him back. Tate, however, never returned Dowd's call. Dowd, after checking several other places for Tate without success, was finally advised on the afternoon of December 17 by Margaret Lind, the Employer's office manager, that Tate had left for Europe and would not be back until mid-January. Since, according to Dowd, he had been told by Tate that the contract had to be approved by January 1, 1981, he advised Lind that he expected the agreement to be executed by December 31 and that the employees should have a written contract in hand so as to properly be able to exercise their rights under it with regard to such matters as grievance processing. He added that Lind should keep in touch with business agent Smith for the purpose of administering the contract while he got contract language to Tate so that they could get something typed up and executed as soon as possible.

On January 4 Tate returned from Europe. In the meantime Dowd had taken Tate's last and final offer which the employees had ratified and the various proposals which he believed had been agreed to by the parties over the year's negotiations and synthesized an agreement which he felt reflected the understanding of the parties. Dowd testified that it was his understanding that the parties had agreed on all substantive issues, that there was usable language already included in the proposals proffered by one side or the other, and that it was only a matter of either Dowd or Tate "getting a document to the other person for final review." In support of the contention that this understanding was well-founded, it was emphasized at the hearing through the testimony of several of the General Counsel's witnesses that, unlike past practice, no provision was made at the end of the December 15 meeting for additional bargaining sessions. Elsewhere, however, Dowd testified that during the December 15 bargaining session Tate stated that "he thought we could reach agreement very quickly on language, that he might even be in Chicago[8] on business sometime in the near future and we could work out language between the two of us, that we had agreement and the language should be no obstacle." Thus, it would appear that, although no specific date had been put aside for further negotiations, at least one more bargaining session was contemplated by Tate which would permit the parties to iron out the language not yet agreed to.

On January 5 Dowd forwarded to Tate the agreement which he had put together along with a cover letter in which he recounted his efforts to contact Tate on December 16 and 17 and his experience of being advised that Tate was in Europe.[9] He noted that he had enclosed

[5] See G.C. Exh. 32 where, in the addendum to the Union's proposed agreement, Dowd admits that no agreement had been reached on the language in 11 articles. The history of bargaining indicates strong feelings on Tate's part that language be specific and accurate. He should under the circumstances at least be permitted to see and consider the language of the contract which he is expected to execute before being required to do so.

[6] *Lincoln Hills Nursing Home*, 257 NLRB 1145 (1981).

[7] Jack Smith, the union business agent who conducted the election, testified that it took place on December 17 whereas Dowd testified that it was conducted on December 16.

[8] Dowd's law firm is located in Chicago.

[9] The letter reflects, as did Dowd's testimony at the hearing, that he was quite annoyed at Tate's sudden unannounced departure for Europe at a time when he had been given to know by Tate that it was essential to get agreement by the end of the year. Tate's testimony on this subject was somewhat cavalier, giving the impression that it was nobody's business when he decided to go abroad. An analysis of the bargaining notes taken by Margaret Lind and the documentation supplied by Tate reflect a history of bargaining singularly lacking in humor, accommodation, or the amenities, peppered with acerbic and gratuitous remarks by the representatives of both sides and full of condescending lectures by Tate concerning his opinion of his opponent's professional ability or alleged lack there-

Continued

a draft of a completed contract for Tate's review with a listing of sections which required language changes or additions to reflect their agreements. He also offered to meet with Tate again if necessary but stated that if the enclosed draft agreement was satisfactory in substance he was prepared to execute the agreement on behalf of the Union.

When Tate received Dowd's draft of the agreement he noted that it differed in several respects from his understanding of what had actually been agreed on. Thus, he testified that whereas in his last and final offer employees hired after December 1980 were not to receive probationary or longevity increases, Dowd's draft provided that all employees receive these benefits. Tate found the language of this article also objectionable in other respects. Tate reviewed the draft agreement, but only superficially since he felt that the provision on wages was so far from what had been agreed to that there was no point in talking about anything else and because he intended to meet with Dowd face to face to iron out the differences. He did note, however, provisions which he considered to contain certain additional inconsistencies including the requirement that the Employer pay any increased premium costs in health insurance.

On January 12, Tate wrote to Dowd in reply to the latter's January 5 letter and contract draft. Sensitive, apparently, to Dowd's remarks about his being unavailable the previous December 16 and 17, Tate begins undiplomatically with, "I make no apologies for being out-of-town and/or engaged in negotiations every day last week." He then states that he had a limited amount of time to scan Dowd's "write up" and is leaving the following day until January 26. He advises Dowd that from a "cursory scanning" of his proposal, they will have to make some changes. He notes a problem with the provisions on wages, then chooses the unfortunate wording: "I quickly see you took liberties in your new wording of wages, health insurance, seniority, (90 *work* days), hours of work, holidays for people not at work, vacation items such as adding weeks we did not agree upon, new wording on sick leave and omitted some paragraphs . . . plus omission from the contract of a number of mandatory subjects of bargaining that we have consistently felt were an integral part of any agreement reached." Then in a sudden turn from the accusatory tone, Tate states how pleased he is that Dowd was able to get so much of the agreement put together. He offers to meet with Dowd on January 26 at 12:30 in Sioux Falls and opines that the parties should be able to finish up quickly so that he can leave at a quarter of six. He adds that, if Dowd thinks more time will be necessary, he would be willing to set aside January 29 or other dates that Dowd might suggest.

On January 21 Dowd replied to Tate's letter of January 12. In it, Dowd notes Tate's choice of phraseology: his "cursory" scan, his charge that "liberties" had been taken in new wording. He then requests, in order to obtain quick agreement on all terms of a complete contract, that Tate identify the portions of the proposed agreement to which he objects and to make a written counterproposal that he feels adequately expresses their verbal agreement. He also requests that any "mandatory subjects of bargaining" which Tate wants included be submitted in writing prior to their next meeting. Dowd adds pointedly:

> I suggest that the requirements of good faith bargaining preclude the manufacturing of last minute roadblocks to the signing of an agreement.

Dowd then advises Tate that he will call him to schedule a meeting after receiving and reviewing Tate's response.

It is evident that the tone and content of Tate's January 12 letter galled Dowd and goaded him into refusing to meet with Tate either on the suggested dates or at any time until Tate provided the information in writing which he demanded. The evidence is inconclusive as to whether or not agreement would have been reached if Dowd had agreed to meet with Tate as the latter had proposed. Dowd argues convincingly that the language differences in the 11 articles which had not been agreed on were minimal. In my opinion, the parties should have met once again to iron out these differences. The approach that Dowd took only further exacerbated an already difficult situation.

On February 9 Tate replied to Dowd's January 21 letter. In his reply Tate continues the discussion over his previous usage of the terms "cursory examination" and "your taking liberties" as though to have the last word on such things were one of the more important objectives of collective bargaining. He accuses Dowd: "You seem to be on your 'horse' about my statement about your taking liberties. . . ." Elsewhere he states: "Beyond liberties, I call it down right 'sneaky' and poor faith. . . ." and still elsewhere, "Who are you trying to mislead? And, you presume to talk about bad faith!" The acid tone of this letter, in my opinion, prolonged the personal feud between the two representatives of the parties and interfered with and regrettably crippled the collective-bargaining process.

More substantively Tate, in this letter, made the following observations:

Wages: The 3-month and anniversary increases required for *all* employees in Dowd's January 5 draft were not agreed to by Tate on December 15. These increases were for current employees only, not for employees hired after December 31, 1980.

Part-time employees' wages were not discussed on December 15 so that the wages agreed on were for full-time employees only. Tate claims that wages for part-time employees were still to be negotiated and suggests that they be paid the same as full-time employees without the 3-month or anniversary increases.

Health insurance: The provision in Dowd's January 5 draft providing that the Employer pay any increase in premiums was never agreed to by the Employer during negotiations. On the contrary, the Employer has always insisted that employees covered by the plan continue to pay two-thirds while the Employer continue to pay one-third.

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of. In my opinion, the bitterness engendered by these frequent confrontations eventually resulted in a subversion of all good intentions and of the genuine efforts of the negotiators to reach agreement.

Seniority: Tate notes that in the January 5 draft, in article 8 on seniority, section 5, page 13, Dowd uses the term "calendar days"[10] rather than "work days" as Tate has it.

Hours of work and overtime: Tate states that no agreement had been reached on this article and observes that he had been reminded that this was the case by Dowd during the August 18 meeting. Tate further notes: "I have no idea where you obtained that new first paragraph, also in your article on Hours and overtime!"

Tate states that he never agreed to Dowd's language in sections 2 and 3 of this article but is willing to do so at this point.

Tate also rejects the term "reasonable period in advance," as it appears in section 4 of this article as it applies to the posting of work schedules, as not having been agreed on, but implies willingness to go along with 1 week's notice as reasonable.

Holidays: Tate denies that the Employer ever agreed to the last sentence in section 2: "Employees not on duty shall be paid on the basis of the total number of hours each employee is normally scheduled to work."

Vacations: Tate complains that Dowd had rewritten section 6 but was not specific as to any particular portion thereof.

Sick leave: Tate charges that Dowd was "down right 'sneaky'" for leaving out part of a sentence in the sick leave provision. More particularly he argues that the Employer's position is that an employee accumulates 1 day of sick leave per month with the proviso that he do so if the employee had not been absent the previous month. Dowd had left off this proviso. Moreover, Tate charges, Dowd left off the last three paragraphs that he had proposed.

Funeral leave: Tate questions whether Dowd is trying to mislead by putting in a funeral leave provision different from the one he agreed to on May 9, 1980.

Time off for union activity: Tate charges Dowd with "gratuitously" adding a sentence which he had not agreed to.

Tate complains that Dowd omitted entirely any reference to "coverage" and to "supervisors" and closes with a request for dates to meet to "wrap up these negotiations." He asks Dowd to advise him if he has made any errors or mistakes and promises that he will be "quite willing to discuss them."

Both Dowd and Tate testified concerning these letters. Tate testified that he wrote the February 9 letter because he was "mad" that the parties could not get together for a meeting and because "You can't negotiate by mail." Tate admitted that he did not review all of the material available before writing the letter but merely highlighted items which he felt warranted discussion. His review was therfore cursory and, since he felt that any differences could be ironed out quickly at a meeting, he invited Dowd to discuss with him any errors or mistakes contained therein. Specifically treating the subject matters contained in the February 9 letter Dowd and Tate testified as follows:

Wages: Dowd testified that although Tate in his letter denied that the 3-month probationary and anniversary wage increases were not to apply to employees hired after January 1, 1981,[11] he never placed such a limitation on his wage proposal at the December 15 negotiations. Despite this testimony Dowd acknowledged that he himself wrote down Tate's final offer and placed it in the record as General Counsel's Exhibit 31. This document clearly indicates that current employees were to receive probationary and anniversary raises while new employees would not. I therefore find that Tate's final offer, the offer supposedly presented to the employees, contained different wage rates for current and future employees and that his February 9 letter was accurate as to this issue.

Dowd testified that although Tate's February 9 letter states that the wage increases apply to full-time, not part-time, employees Tate had never limited his wage proposal to full-time employees only during negotiations or at any other time, verbally or in writing. Tate testified that no agreement had been reached with regard to wages for part-timers and his mention of them in the February 9 letter was in hopes that the parties get together across the table to arrive at an agreement concerning them.

With regard to this issue Tate is correct insofar as he argues that evidence does not indicate for certain that the wage increases bargained were to apply to part-time employees as well as full-time employees. Indeed, the testimony and documentation would appear to indicate that part-timers were not discussed as such vis-a-vis the wage increases. On the other hand, Dowd's argument seems to be that if Tate planned to treat part-time employees differently he would have so indicated in his final offer.

According to Lind's notes, at one point during the December 15 negotiations, wage increases were being discussed and Dowd asked Tate whether the increase applied to LPNs. Tate's reply was, "Yes, *all* unit people." Since regular part-time employees are in the unit, if Tate did not mean for them to be covered by the wage increases under discussion he would have added, "except part-time employees." Though not conclusive it would appear that Tate intended part-time employees to be covered by his last and final offer. Moreover, Tate asked Dowd to take his final offer back to the employees for either ratification or at least consideration. This request would be senseless if he was, in fact, requesting the unit employees, full time and part-time alike, to vote on a wage increase package offered solely to the full-time employees. In my opinion, Tate's final wage package was meant to cover all employees full time and part-time when proposed on December 15, and it was not until January or February when he got "mad" at Dowd that he decided to give him a hard time and withdraw the wage offer as it applied to part-time employees. I consider the withdrawal of this wage proposal, under these circumstances, reflective of bad faith and a violation of the Act. *San Antonio Machine Corp.*, 147 NLRB 1112 (1964), enfd. 363 F.2d 633 (5th Cir. 1966).

[10] Referring to the probationary period for employees returning to work for the Employer.

[11] Tr. 158.

Health insurance: Dowd testified that, although Tate, in his February 9 letter, denies that he agreed to a cost freeze for the employees' share of the health insurance premiums, he did, in fact, do so on December 15. For reasons noted earlier I find that no agreement was reached on health insurance.

Seniority: The management understanding of June 5, 1980, indicates that "calendar days" was agreed to by Tate. Tate's testimony was that he had probably forgotten this change, at the time he wrote the February 9 letter, having made only a cursory study of the differences and agreements between the parties. Clearly, if the parties had met to discuss this particular matter, it could have been cleared up quickly by Dowd indicating the June 5 acceptance of the language by Tate.

Hours of work and overtime: Dowd testified that the first paragraph of this article, which Tate questioned, had been among the Union's November 13 counterproposals which Tate accepted in writing on December 15 and was included verbatim in his January draft.[12] Indeed, Tate specifically accepted this language on December 15 in writing.[13] At the hearing Tate basically conceded that the language had, in fact, been agreed on and that his failure to recognize it was based on the fact that he had hurriedly glanced at it. I conclude that the difficulty here was again not a matter of bad-faith bargaining but of Tate permitting the personality conflict with Dowd to interfere with his judgment. If Dowd, on the other hand, had agreed to meet with Tate to iron out these differences, in person, he could have indicated to Tate his previous agreement in a matter of seconds.

With regard to the same article, sections 2 and 3, Dowd testified that he copied section 3 virtually verbatim from Tate's "Management Understanding" of June 5[14] which lists articles and sections agreed on by both parties and that Tate, in his written proposals dated December 15, agreed to the language in section 2. Dowd is correct in both instances despite Tate's testimony to the contrary.

The disagreement between the parties with reference to this article reflects as well as any that negotiations were seriously marred by the inability of the parties to concentrate on reaching agreement because of their insistence on making issues of nonissues. Thus, Tate, in his February 9 letter, chides Dowd for putting into his draft agreement sections 2 and 3 because the language had never been agreed on, only to agree to it then and there. What a waste of time. Dowd and the General Counsel, not to be outdone, ignoring Tate's acceptance of Dowd's language, go ahead anyway to prove how the language was obtained. Once again, had the parties met the problem could have been resolved in moments rather than the weeks it took to exchange letters.

With regard to Tate's objection to the use of the term "reasonable period in advance" as it appears in section 4, Dowd testified that back in August it had been agreed that if acceptance language on grievances and arbitration could be agreed on, the Union in return would withdraw its demand for 2 weeks' advance posting notice and live with a flexible provision on posting. Thus, "reasonable period in advance" was decided on by Dowd without it ever having actually been written down, and, of course, without ever having been seen by Tate in the form appearing in Dowd's draft.

Tate testified that he had initially agreed to 1 week's notice as did the Union.[15] Then Dowd took out the 1 week's notice provision and put in "reasonable period of time," which he had not agreed to.

The issue here is whether Tate's reaction to Dowd's use of the terminology was indicative of bad faith. I find that the evidence is insufficient to warrant such a conclusion. Rather, as was the case with several of the other differences already discussed, the differences over language here were so slight that they could certainly have been worked out in a brief meeting between the two, a meeting which Dowd had refused to have until the unfortunate exchange of letters took place. The opportunity which Tate took to vent his spleen may have been indicative of bad humor but not bad faith, and the former is not violative of the Act, particularly in light of the fact that Tate continued throughout to offer to meet to negotiate such differences.

Holidays: Dowd testified that the sentence which Tate objected to is based on the Employer's proposal of February 12[16] which was reviewed in August when the word "normally" was inserted. According to Dowd, the parties in August had determined that the method for calculating holiday pay on a prorata basis had been agreed to although the rest of the article had not been agreed on. Dowd argues that section 4 which appears on page 48 of that document was substantially agreed on in August.

Tate testified that he had always strenuously objected to anything that tends to pay employees on a holiday on which they do not work. He added that the subject matter was discussed only early in the negotiations and no agreement was reached. He complained that Dowd took section 4 out of context and placed it elsewhere to provide that employees not on duty should be paid, something to which Tate had never agreed.

My own analysis of the documents cited by Dowd convinces me that Tate is right and that all that may have been agreed to in August insofar as section 4 is concerned was the definition of "Days Pay." Section 4 does not deal with the payment of employees not on duty. The August 18 notes of Margaret Lind indicate no such agreement. On the contrary, the notes appear to indicate a lack of agreement. In short I find that the sentence in dispute was never agreed on by the parties.

Vacations: Dowd testified that the language on vacations which he included in his draft had not been signed off but was an attempt on his part to reflect the Employer's present policy while "cleaning up" the language

[12] G.C. Exh. 32.
[13] G.C. Exh. 25.
[14] G.C. Exh. 16.
[15] Elsewhere Tate testified that the parties had agreed on the Employer's formula that posting occur on the Thursday before the scheduled week's work which was to begin on the forthcoming Saturday. Tate was unable to state when this agreement was allegedly reached. I do not credit Tate on this matter.
[16] G.C. Exh. 11.

Tate had proposed to fit in with the format of the agreement as a whole.

Tate testified that he did not necessarily disapprove of the language used by Dowd but as "a matter of common courtesy" felt that he should have asked him what he thought of the wording before putting it into the contract. He felt that, since the language on vacations had not been agreed on, the attorneys should have gotten together to work out the language.

Once again, in my estimation Tate and Dowd permitted their personal feelings to interfere with their jobs. Dowd did the best job he could in proposing language on vacations which had not been agreed to and including it in his draft agreement. He carefully took pains to advise Tate in his addendum that he was aware that his language had not yet been approved and that the document was merely a draft. Though the article reflects the current policy of the Employer and Tate admitted, "I don't see here anything particularly to disagree with on vacations," he nevertheless took issue with the fact that Dowd had written the article into the agreement without first discussing it with him. Since he did not reject the article as such nor accept it either for that matter, it appears, in light of his invitation at the end of his letter to meet with Dowd "to wrap up these negotiations," that Tate intended to likely sign off this article when he eventually met with Dowd. I find no violation with regard to Tate's position on this particular matter.

Sick leave: Dowd testified that Tate had agreed to withdraw his demand that the sick leave policy be modified and agreed on December 15 to continue the policy that existed. The language was taken from the employee manual.[17]

Tate testified that when he wrote his February 9 letter he could not recall agreement on sick leave, that he wrote his objection to Dowd's sick leave provision because he wanted to get back to the bargaining table. He stated that he used the terms "sneaky" and "poor faith" in connection with this provision because he felt that Dowd was trying to tell the Employer and Tate that an agreement had been reached when, in fact, there had been none. On cross-examination Tate admitted that in his cursory examination he had overlooked the fact that the parties had gone back to the original sick leave plan. It would appear that on this issue Dowd was correct to the extent that sick leave had been agreed on. Nevertheless, I do not believe that Tate's objection was made for the purpose of frustrating bargaining but was an honest mistake, made in a fit of pique, not fully warranted, in unfortunate terms, which resulted in fueling the fire which all but destroyed the collective-bargaining process. Again, it would have been better to meet and resolve this difference of opinion in person.

Funeral leave: In reply to Tate's charge that Dowd was trying to mislead by putting into the draft contract a funeral leave provision different from the one agreed to on May 9, Dowd testified that his funeral leave provision was taken verbatim from Tate's June 5 memorandum, management understanding.[18] An Analysis of the two documents reveals that Dowd is correct.[19] Tate, after being shown the documents in question, admitted while testifying that the article as written accurately reflects the June 5 agreement. Nevertheless, despite the fact that Dowd was correct and Tate in error with regard to the funeral leave provision, I do not find it indicative of a desire on Tate's part to frustrate the collective-bargaining process but rather the product of personal animosity, and an error which could quickly have been eliminated at the face-to-face bargaining which Tate had requested and which Dowd had rejected. For that reason I find no violation with respect to the position of Respondent on this matter.

Time off for union activity: Dowd testified that the sentence to which Tate objected was probably the one beginning on page 23 and ending on page 24 of the draft contract which provides that the 80 hours leave granted to employees to participate in union activities each year would be in addition to any time necessary for a steward or employee to participate in the handling of a grievance or in arbitration. Dowd admitted that this sentence had not been previously written down but averred that it had substantively been agreed to at the December 15 meeting although there had been no agreement at the time as to precisely where in the contract the subject should be covered. In his addendum, Dowd specifically indicated to Tate that this particular sentence's language had not yet been agreed on.

Tate, who miscited the placement of the objectionable sentence in his February 9 letter, was still confused during his testimony at the hearing but insisted that the sentence of which he complained had not been included in the June 5 Management Understanding memorandum.

With regard to this provision Tate is correct that the sentence in question was not included in the Management Understanding memorandum of June 5. From an analysis of Lind's notes it appears that the subject may have been discussed but there is no clear indication that Tate agreed to the addition. I find that he did not.

Coverage and supervision: Dowd testified that neither "coverage" nor "supervisors" were ever discussed during negotiations prior to their being mentioned in Tate's February 9 letter and that, since Tate had taken the position on December 15 that the parties had reached agreement on all substantive issues and that there remained only the matter of language which would easily be arrived at, inclusion of provisions on "coverage" and "supervisors" was not contemplated.

Tate testified as to the importance of supervisors[20] being covered in a contract covering nursing home employees and noted that, although the subject was not discussed during the December 15 meeting, it had been brought up earlier and had never been withdrawn from the table.

A study of documents preceding the February 9, 1981 letter indicates that in its February 12, 1980 counterproposal the Respondent proposed a provision on "coverage" and one on "supervisors." In his May 9, 1980

[17] G.C. Exh. 36.

[18] G.C. Exh. 35.

[19] An obvious typographical error is presumed not to be the basis of Tate's objection.

[20] Tate said nothing about "coverage."

memorandum entitled "Status of Contract Negotiations" Tate noted the existence of these two articles and stated that no agreement had been reached on either provision. Thereafter, nothing was said concerning these matters until Tate obliquely referred to them in his letter of January 12, 1981.[21]

In my opinion, if all other matters in question had been resolved and the Respondent had refused to sign the contract solely because of the failure of the Union to include "coverage" and "supervisors" in its draft and had not suggested further meetings, I would be inclined to follow *Kennebec*[22] and find a violation. However, since I am determining herein that no agreement was reached between the parties, I do not conclude that Tate's somewhat belated request to talk about these subjects is tantamount to bad-faith bargaining.

According to Dowd, when he received Tate's February 9 letter he did not read it as "a sincere effort to reach an agreement" nor did he believe that the "mistakes" that were in the letter were really mistakes. His reaction to the letter was that Tate had "deliberately sabotaged the agreement." On March 11, the charge in the instant proceeding was filed. No further attempts at negotiations took place.[23]

With regard to negotiations, it would appear that generally each participant was bargaining in good faith but because of personality conflicts could not bring himself to deal with his opposite number with consideration or with accommodation. Thus, Tate, whether meaning to or not, was atrocious in his choice of language in dealing with the Union's designated representative. Dowd should not have, but did, in fact, cut off negotiations because of Tate's undiplomatic choice of words. For that reason negotiations bogged down. I cannot therefore recommend to the Board that the Respondent be ordered to meet and negotiate with the Charging Party because the Respondent (Tate) has consistently offered to do just that. I cannot recommend to the Board that the Charging Party (Dowd) be ordered to meet and negotiate with the Respondent because obviously there is no charge against the Charging Party. Therefore, in addition to the usual recommended order appearing below, I shall also recommend at this point that the Board *urge* the parties to resume negotiations with renewed dedication to resolving the contractual issues remaining and, with priorities firmly set placing accommodation, trust, and goodwill above personal feelings.

[21] Tate referred to "omission from the contract of a number of mandatory subjects of bargaining that we have consistently felt were an integral part of any agreement we reached." I assume "coverage" and "supervisors" are the subjects he was talking about.

[22] *Kennebec Beverage Co.*, 248 NLRB 1298 (1980).

[23] Dowd's testimony that he suggested further negotiations is not supported by the evidence. The General Counsel placed 41 exhibits in the record including all correspondence between Dowd and Tate and there is nothing among them to indicate that Dowd suggested further negotiations. On the contrary, aside from this bald assertion, unsupported by testimonial detail, all his other testimony indicates that Tate's February 9 letter turned Dowd off to the extent that he rejected Tate's offer to meet and sought to accomplish his ends through the filing of the charge herein.

B. *Other Alleged Violations*

1. Wages

The complaint in the instant case which is founded on the March 11 charge alleges that about January 1, 1981, the Respondent granted wage increases to newly hired employees and denied similar wage increases to employees who had completed their probationary period prior to that date for discriminatory reasons. In its answer, the Respondent admits that it granted wage increases on January 1, 1981, to the minimum wage but not for reasons violative of the Act.

The record indicates that the Respondent, prior to January 1981, would, whenever the minimum wage was increased, grant to all employees the same increase, whether it was necessary to raise an individual employee's wages up to the new minimum or whether the result of the increase was to bring an employee's wages to a point well above the minimum. In January 1981, after first deciding to follow past practice, the Respondent, on advice of counsel, decided on this occasion to grant only sufficient wage increases to bring the wages of its employees up to the minimum wage and to deny similar wage increases to its employees who were already at or above the minimum wage. This change in established practice was made unilaterally, without prior notice to the Union and without having afforded the Union an opportunity to negotiate and bargain over it as the exclusive representative of the Respondent's employees. The Respondent thereby violated Section 8(a)(1) and (5) of the Act. Further, this action was taken admittedly because the Respondent was at the time engaged in collective bargaining. Consequently, it is likewise in violation of Section 8(a)(3).

On March 11, the Union filed the charge in the instant case including among its allegations one which charged the Respondent with unilaterally and illegally failing and refusing to institute annual wage increases. On August 7 Orville Berkland, the Respondent's administrator, wrote a memorandum to Luther Manor employees and posted it. The memorandum states:

> Your Board of Directors does not feel that the labor union that has sought to represent you has been good for you, Luther Manor nor its residents. . . .
>
> The delays occasioned by this representative have been bad for everyone[24]. . . .
>
> Your Board has thus decided to:
>
> . . . .
>
> 2. In addition all aides and cooks hired before January 1, 1981 will receive a $.30[25] an hour wage increase effective immediately, and those hired since January 1, 1981 will receive a $.05 an hour increase effective immediately.

[24] The letter also blamed the NLRB for delays.

[25] Berkland testified that the increase was to make up for the Respondent's failure to grant the January increase and due to error by office personnel was made for 30 cents rather than the 25 cents as intended.

Thereafter, the wage increase recommended by Tate was implemented but was not made retroactive. The Union received no notice.

The August 7 actions of the Respondent, the unilateral wage increase which was meant to make up for the Respondent's failure to grant the increase in January in keeping with past practice and the additional 5 cents increase for new employees were, in my estimation were violative of Section 8(a)(1) and (5) because of their unilateral nature and were violative of Section 8(a)(1) and (3) as well because they were accompanied by an unwarranted claim that the Union was to blame for the delay, an unfounded charge intended to undermine the faith of the employees in their bargaining representative.

Health insurance premium increases: The complaint alleges that about April 1, 1981, the Respondent unilaterally increased the cost of health insurance premiums to its employees. The record indicates that prior to the advent of the Union those employees enrolled in the health insurance program paid two-thirds of the premiums while the Respondent paid one-third and that whenever there were increases in the premiums the increases were paid in the same ratio.

On April 1, 1981, there was an increase in the health insurance premiums. The Respondent in accordance with past practice paid one-third of the increase and passed on two-thirds of the cost to employees. As I have found above that there was no agreement between the Union and the Respondent to change the past practice concerning the payment of life insurance, I consequently find that the Respondent did not violate the Act when on April 1 it continued the previous practice of paying one-third of the increase in premiums and required its employees to pay two-thirds thereof.

Sick leave and absences: The complaint alleges that since about April 1, 1981, the Respondent has unilaterally implemented new policies regarding sick leave and absenteeism.

The record indicates that prior to January 1, 1981, employees who were absent because of sick children were excused. Sometime in February this policy was changed and employees who were absent because of sick children were charged with an unexcused absence with a notation made to this effect in the Respondent's personnel records. The change in policy was made without notice to or consultation with the Union.

The Respondent admits the unilateral change but defends on the basis that the effects of the change have been de minimis and claims that the change is merely a matter of recordkeeping since no employees have been disciplined for unexcused absence.

The unilateral action of the Respondent appears to me to be clearly in violation of Section 8(a)(1) and (5). Changing the classification of this type of absence from excused to unexcused is clearly a change in working conditions which should have been negotiated with the Union before implementation. The fact that no employees have been disciplined as yet as a result of being charged with unexcused absences is irrelevant since records of such unexcused absences are being recorded and the potential for disciplining is obvious.[26] It strains one's credulity to believe that the Respondent has chosen to change a longstanding practice as it has in this case for no purpose whatsoever. The violation is clear.

Similarly, whereas before the above change in practice was initiated, employees would be granted permission to be absent from work to take care of sick children, since that change employees have been refused permission under such circumstance. Since this change in working conditions was likewise unilateral in nature, it too is violative of Section 8(a)(1) and (5).

2. Promotion of the LPNs

On August 7, 1981, in the same memorandum which granted the wage increases discussed above, the Respondent announced in pertinent part:

> The delays occasioned by this representation have been bad for everyone.
>
> While we do not agree with the union the delays of the NLRB have also been debilitating.
>
> Your board has thus decided to:
>
> 1. Make *our present* LPNs supervisors. In the future you *should* expect from them information and direction from them as the first step of management as to directing your work, handling your complaints, performing evaluations, and other supervisory duties.

The implication of this statement is that the plan to convert LPNs to supervisors had long been under consideration but was not implemented earlier because of the status of negotiations with the Union. Indeed, Director of Nursing Margaret Roberts testified that discussions concerning promoting LPNs to supervisory status took place several months before the August memorandum issued. According to Roberts one of the reasons the promotion of LPNs was being considered was because the RNs who had been doing the supervising had increasingly been burdened by additional paperwork.

Berkland's testimony was corroborative of Roberts' in that he stated that the promotion of LPNs had been under consideration throughout 1980 and 1981 and that additional supervisors were needed because the RNs were bogged down with other duties. Berkland explained further that in the past there were times when there was only one RN in the building or when both RNs were busy and could not complete their other duties and perform their assigned supervisory duties as well. It was therefore decided that in these situations where in the past the LPNs performed certain supervisory duties on behalf of the RNs because the RNs were unavailable, the LPNs should actually be assigned the supervisory tasks themselves, tasks which they had been performing but which were not in their job description. It was also decided that they should be assigned additional supervisory duties over and above those which they had been per-

[26] Indeed, Berkland, at one point, admitted that it is conceivable that too many unexcused absences could conceivably result in disciplinary action being taken.

forming themselves and receive a 90-cent-per-hour wage increase to cover the added responsibilities.

The decision, having been made, the LPNs were, on August 6, called together and advised[27] of the decision which was issued in memorandum form the following day. The upshot of the change was that the LPNs were to continue to perform all the duties which they had been performing already, but were, in addition, assigned supervisory duties which they had not been assigned before. Thus, in addition to their old duties, LPNs under the new job description were given additional authoritative duties which they did not have before. On August 6 Berkland advised the LPNs that, whenever LPNs were on shift, they would be making some of the assignments whether or not there was an RN on duty in the wing. The RN, as charge nurse, would be doing the necessary paperwork while the LPNs would take care of the supervision of the aides. Over and above Berkland's address to the LPNs as to their new duties, there was issued several days later, on August 17, a new LPN supervisory job description which differed in several respects from the LPN's job description in effect prior to August 17.[28] The relevant differences which indicate additional duties assigned to the LPNs are as follows.

1. Work as charge nurse—assign aides to wings, make doctor calls, take telephone orders, note orders.
2. Will write disciplinary actions on nurses aides.
3. Supervise personnel and direct them in patient care.
4. Does evaluations on nurses aides and makes recommendations in regard to promotions or terminations.
5. Gives permission for aides to leave early if ill or have appointment or come in late for similar reasons—initials timecards.
6. Calls in nurses aides or professional staff if short staffed.
7. Determines if calls for absences are excused or unexcused.
8. Grants overtime to aides if situation warrants.
9. In absence of inservice director, will demonstrate and explain new procedures to nurses aides.
10. Admits residents and does assessment of physical and mental condition.
11. Assists in writing of careplans and summaries.
12. Does patient care council when assigned.
13. Uses independent judgment and has wide discretion in directing the work and performance of the nurse's aides.

Thus, the new LPN supervisory job description does in fact assign supervisory duties to the LPNs.

Further, the Respondent presented a number of witnesses who credibly testified that they have, in fact, performed certain of the described duties. I therefore conclude that the Respondent did promote the LPNs to supervisory positions[29] and, moreover, did so unilaterally without notice to or consultation with the Union.

While the reclassification was admittedly unilateral in nature, the reasons proffered by the Respondent for reclassifying the LPNs and giving them supervisory duties, i.e., that more supervision was needed on the floor, I find to be reasonable, logical, and credible. There being no evidence that the Respondent took the action for the purposes alleged in the complaint, I find such action not to be illegally motivated. The question remains whether, despite the absence of discriminatory motivation, the Respondent violated Section 8(a)(5) by its unilateral promotion of the LPNs to supervisory status. I find in the affirmative for it is well settled that an employer has a duty to bargain when it changes the duties of bargaining unit employees' classification which result in the employees' removal from the bargaining unit to supervisory positions. *Highland Terrace Convalescent Center*, 233 NLRB 87 (1977).

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The Respondent's unfair labor practices, as found above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that the Respondent has engaged in unfair labor practices warranting a remedial order, I shall recommend that it be ordered to cease and desist therefrom and that it take certain affirmative action designed to effectuate the policies of the Act.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce and in an industry affecting commerce within the meaning of Section 2(6) and (7) of the Act and a health care institution within the meaning of Section 2(14) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. All full-time and regular part-time licensed practical nurses and service and maintenance employees employed by the Respondent at its Sioux Falls, South Dakota facility; excluding administrator, assistant administrator, registered nurses, business office clericals, guards and supervisors as defined in the Act constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since January 2, 1980, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropri-

[27] Berkland told the LPNs that they had a choice of adopting the new job description or not, but if they accepted the newly assigned duties they may well be placed outside the bargaining unit as supervisors, a matter which might still have to be negotiated with the Union.

[28] The general description of duties contained in the new "LPN Supervisory Job Description" is a virtual duplicate of the old "LPN Job Description."

[29] *Northwoods Manor*, 260 NLRB 854 (1982).

ate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By withdrawing the wage proposal previously offered for all unit employees and later restricting said offer to full-time employees only, the Respondent violated Section 8(a)(1) and (5) of the Act.

6. By unilaterally withholding wage increase adjustments from employees not coverd by Government wage regulations in disregard of preexisting policy the Respondent violated Section 8(a)(1) and (5) of the Act and, by undertaking such action because it was at the time engaged in collective bargaining, the Respondent violated Section 8(a)(1) and (3) of the Act.

7. By unilaterally granting wage increases the Respondent violated Section 8(a)(1) and (5) and by falsely blaming the Union for the delay in granting such increases, the Respondent violated Section 8(a)(1) and (3).

8. By unilaterally changing its sick leave and absenteeism policy the Respondent violated Section 8(a)(1) and (5) of the Act.

9. By unilaterally reclassifying LPN employees to supervisory positions the Respondent violated Section 8(a)(1) and (5) of the Act.

10. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

[Recommended Order omitted from publication.]